RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY

John F. Beatty
Deputy County Attorney
Bar ID #: 012627
301 W Jefferson St, 4th Floor
Phoenix, AZ 85003
Telephone: (602) 506-5780
MJC1-Homicide@mcao.maricopa.gov
MCAO Firm #: 00032000
Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF APACHE

STATE OF ARIZONA,	
Plaintiff,	
vs.	
JOSEPH DOUGLAS ROBERTS,	CR 2010-00047
Defendant.	RESPONSE TO DEFENDANT'S MOTION FOR REVIEW OF PRELIMINARY HEARING
	(Honorable Donna J. Grimsley)

The State of Arizona, by undersigned counsel, has reviewed the Defendant's Motion for Review of Preliminary Hearing (which appears to be a motion for new finding of probable cause pursuant to Rule 5.5(a), Ariz.R.Crim.Proc.), the transcript from the two-day preliminary hearing, and some of the police reports in the various investigations relevant to this case. Undersigned counsel is still waiting for further supplemental reports and other items from the investigating agencies.

What is apparent from the transcript is that the defendant was not denied any substantial procedural rights, and credible evidence of probable cause was brought forth during the hearing,

both as to the crimes themselves and also as to the defendant's commission of those crimes. The evidence presented at the preliminary hearing supported the charges in the Complaint and supported the magistrate's finding of probable cause.

The Motion for Review of Preliminary Hearing (new finding of probable cause) is not warranted by the evidence and therefore should be denied. This Response is supported by the attached Memorandum. Due to the extensive nature of Defendant's Motion, the State requests leave to exceed the standard page limit.

Submitted September 3, 2010.

RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY

By /s/_____
/s/ John F. Beatty
Deputy Maricopa County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

A. PROCEDURAL HISTORY

During and after the first day (February 5, 2010) of the hearing, the defense asked for rulings on three matters: dismissal, telephonic testimony, and transportation of a witness. Sometime after this date, but prior to March 19, according to defense counsel at the second day of the hearing, a bar complaint had been filed and was pending against the Apache County Attorney and/or against some of the attorneys who work there.

On March 1, 2010, the defendant filed a Motion to Dismiss in the same Justice Court that was conducting the Preliminary Hearing. The Motion to Dismiss was based in large part on an

allegation that the State had committed prosecutorial misconduct.

On March 3, 2010, the magistrate ruled by minute entry that she lacked jurisdiction to consider the defendant's motions. As it turns out, the motion to dismiss appears to be meritless, considering that the issue of the magistrate's jurisdiction was not affected by the filing of a bar complaint against then-current prosecutors. The other two motions are moot.

On March 19, 2010, the second day of the hearing was conducted. On that date, defense counsel advised the Court and prosecutor that a bar complaint was pending. The Court proceeded with the hearing. At the beginning of the hearing, the magistrate affirmed her conclusion that the various defense motions were filed prematurely and that she did not have jurisdiction over those issues. At the end of the hearing, the defendant was bound over on the charges, and the Information was filed on or about March 22, 2010. On March 29, 2010, the Not Guilty Arraignment was conducted; Judge Grimsley was assigned.

On April 13, 2010, the defendant filed the Motion at bar, asking for a new finding of probable cause pursuant to Rule 5.5(a). On May 7, 2010, the State responded to the Motion. On June 8, 2010, the Court ruled that the Apache County Attorneys Office be removed from the case and that another prosecuting agency be assigned. On July 19, 2010, the Court was informed that the Maricopa County Attorneys Office would be prosecuting the case. Undersigned counsel was out of state at that time and eventually was given until September 3 to respond to the pending motions.

B. FACTUAL BACKGROUND

This case involves allegations regarding the deaths of two individuals: William McCarraghe and Daniel Achten. Mr. McCarraghe was killed at the end of April 2007. Mr. Achten was killed sometime between March and August of 2009. The defendant in the case at bar, Joseph Roberts, is accused of participating in the murder of Mr. McCarraghe, and he is

accused of assisting in the disposal of the body of Mr. Achten. He is also accused of charges relating to the investigation of these crimes, as more fully delineated in the Information.

In April 2007, Mr. McCarraghe was shot to death in his own home by William Inmon and this defendant. Another man, James Dandridge, drove Inmon and the defendant to and from the murder scene and was present during the murder and burglary of the residence. The case was investigated immediately, including interviews of Inmon and the defendant, but no arrests were made at that time.

Two years later, on March 29, 2009, the defendant was stopped while driving a car belonging to Mr. Achten, the second victim. At that time, the police did not know that Mr. Achten had already been killed. Meanwhile, on three separate occasions in March and April, 2009, Mr. Inmon cashed or attempted to cash large checks written on Mr. Achten's bank account; he was investigated for fraud because of those check-cashings.

In August 2009, Sheriff's deputies were investigating what turned out to be the murder of yet another person, a minor named Ricky Flores, when information was developed about Mr. Achten. It was during this time that the defendant's name resurfaced, having been connected to Achten's car (a Corvette). Mr. Achten's local address and property were located and searched. Parts of his skeletal remains were found. It was determined that his body had been partially burned.

On September 25, 2009, Inmon and the defendant were interviewed separately by Sheriff's deputies and investigators for the Apache County Attorneys Office. The two suspects were subsequently arrested. Among other consequences, charges were filed against this defendant; his initial appearance was September 26, 2009. Current defense counsel was appointed on September 30, 2009. The preliminary hearing, originally set for October 2, 2009,

but having been reset several times, began on February 5, 2010.

According to the transcript of the preliminary hearing, on the day before the start of the preliminary hearing, so on February 4, 2010, at least one investigator for the Apache County Attorneys Office met with and spoke to the defendant in the jail without the knowledge or consent of his attorney. The defense argues that this meeting acted to deny the defendant his rights. He filed a Motion to Dismiss based on the February 4 meeting.

C. ISSUES PRESENTED

The Motion at bar seems to address four distinct issues: (1) the evidence presented at the preliminary hearing as regards each of the charges, (2) the impact of the February 4 meeting between the defendant and the investigator, (3) the failure of the court to secure the attendance of a potential defense witness, and (4) the Court's alleged rush to have the case transferred to Superior Court.

D. LEGAL ARGUMENT

I. The Evidence Presented At The Preliminary Hearing Was Sufficient For The Court To Make A Finding Of Probable Cause As To Each Charge.

a. General law regarding Probable Cause

Rule 5.3(a), Ariz.R.Crim.Proc., establishes the parameters of a preliminary hearing, allowing "only such evidence as is material to the question whether probable cause exists to hold the defendant for trial." Once the magistrate determines that there is probable cause, the defendant is permitted to make an offer of proof. If the magistrate determines the offer of proof would be insufficient to rebut the finding of probable cause, then the magistrate is not required to hear the actual proffered evidence.

In State v. Spears, 184 Ariz. 277, 908 P.2d 1062 (1996), the Court instructed us that probable cause exists when reasonably trustworthy information and circumstances would lead a

person of reasonable caution to believe an offense has been committed by the accused. In Brinegar v. United States, 338 U.S. 160, 175 (1949), the Supreme Court found that the facts and circumstances present are to be construed in accordance with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

More recently, in Texas v. Brown, 460 U.S. 730, 742 (1983)(internal citations omitted), the Supreme Court noted that:

> probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief" that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required. Moreover, our observation in *United States v. Cortez,* regarding "particularized suspicion," is equally applicable to the probable cause requirement:
>
> "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same-and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

And finally, in *Illinois v. Gates*, 462 U.S. 213, 238 (1983), the Supreme Court advises us that evidence creating probable cause exists if, in light of all the facts and circumstances, "there is a fair probability" that the crime was committed and that the defendant committed the crime.

b. Count 1: First Degree Murder

i. The method of charging

The Complaint charges the defendant with the First Degree Murder of William McCaraghe, charged in the alternative of premeditated murder or felony murder. The underlying felonies are alleged to be burglary and/or robbery. This is charged under accomplice liability.

The defendant claims that charging first degree murder in the alternative constitutes duplicitous charging. However, in State v. Axley, 132 Ariz. 383, 392, 646 P.2d 268, 277 (1982),

the Court found that an indictment alleging alternative theories of first degree murder is not duplicitous. First degree murder is a unitary offense, meaning it is not subject to duplicitous-charging analysis. In State v. Gerlaugh, 134 Ariz. 164, 168, 654 P.2d 800, 804 (1982), which cites Axley, the Arizona Supreme Court clarified its position, finding that "in Arizona, first degree murder is only one crime whether it is premeditated or a felony murder."

Recent caselaw has echoed this position. In State v. Tucker, 205 Ariz. 157, 167, ¶ 50, 68 P.3d 110, 120 (2003), the Court found acknowledged that the fact that "felony murder and premeditated murder contain different elements does not make them different crimes, rather they are simply two forms of first degree murder."

Charging first degree murder in the alternative does not constitute duplicitous charging in Arizona.

ii. The evidence regarding Premeditation

In his testimony, witness Hounshell agreed only to testify as to witnesses who are available for trial. RT, 2/5/10, pp. 11-12 and pp. 19-21. Hounshell described the scene and investigation of the death of victim McCarraghe in April 2007. The victim was killed by multiple gunshot wounds that came from at least two weapons, all of which were .22 caliber. RT, 2/5/10, p. 14.

Hounshell said that the case went unsolved until August 2009 when a different investigation revealed that Inmon was a suspect in the McCarraghe investigation. RT, 2/5/10, p. 16. During Inmon's interview, Inmon said that he and defendant Roberts put together a plan to kill McCarraghe, and then they went to McCarraghe's house to carry out the plan. RT, 2/5/10, p. 22, lines 4-8. Hounshell proceeded to give details about what happened, who was where and who did what. This testimony showed that Roberts, having premeditated the death of

McCarraghe, went to the victim's house to kill the victim and for other reasons, and then fired his gun into the residence, striking and killing McCarraghe. RT, 2/5/10, p. 23, lines 3-5.

Sgt. John Scruggs, ACSO, testified to the Court that Roberts admitted that he "had been at [the defendant's] residence in St. Johns, Arizona, with William Inmon, and William Inmon had wanted to seek revenge on William McCarraghe, and that [the defendant] agreed to go with William Inmon to the McCarraghe residence and provide backup cover fire for him." RT, 3/19/10, p. 33.

Roberts went with Inmon and Dandridge to get three guns to use in the crimes against McCarraghe. RT, 3/19/10, pp. 33-34. Roberts admitted that he was in possession of a firearm at the McCarraghe residence when McCarraghe was shot. RT, 3/19/10, p. 39. Roberts also admitted that he had been there at the scene of the McCarraghe homicide, that he had participated in the death of William McCarraghe and that he had shot a firearm in the direction of McCarraghe, who was lying in bed. RT, 3/19/10, p. 15.

These admissions, standing alone, are facts which would justify a reasonably prudent person to believe that the defendant premeditated and intended to kill McCarraghe, let alone to aid Inmon in exacting revenge on McCarraghe by providing "backup cover fire" and involving the use of three firearms.

The obvious intention and certainly the reasonably foreseeable consequences of this act of vengeance would be the killing of McCarraghe. The facts show a lengthy passage of time among the various parts of that day: agreement/plan-making at Roberts' house, the drive to Inmon's residence to get the firearms, the drive to McCarraghe's residence, and the setting up of the murder scenario. This passage of time, in the throes of an active conspiracy, gave Roberts time to reflect on the intent to kill McCarraghe. Further, once at the scene, guns having been

loaded a few minutes before, Roberts joined Inmon in the stalking of and shooting into the victim's house.

Roberts intentionally went with Inmon to provide backup cover fire for Inmon, supporting a finding of probable cause that Roberts is at least an accomplice to the premeditated murder of McCarraghe. Roberts agreed to aid Inmon, he provided Inmon the means and/or opportunity to commit the crime (among other facts, he helped to carry firearms to McCarraghe's house), and he fired into a residence where he knew McCarraghe lay helpless in bed.

Further, Inmon had told Hounshell that he shared with Roberts his reasons for being upset with McCarraghe and told Roberts he was going to kill McCarraghe, after which they put a plan together and they both armed themselves. RT, 2/5/10, pp. 21-22. Also, Inmon said they both fired 15 to 16 rounds into McCarraghe's bedroom with their .22 caliber automatic rifles after Inmon yelled something to the effect of "Kill him now." RT, 2/5/10, p. 22.

iii. <u>The evidence regarding Felony Murder</u>

Sgt. Scruggs testified at the hearing that he had interviewed the defendant on September 25, 2009. At that interview, the defendant told Scruggs that "after – according to what Joseph Roberts told me, after William McCarraghe had been shot by William Inmon, Inmon crawled through the window and then let Joseph Roberts in through the front door and then they ransacked or looked around the belongings in the room for property and they stole some items from inside there." RT, 3/19/10, p. 40. This confession, when combined with the previously-mentioned statements that Roberts and Inmon arrived at the McCarraghe residence armed, they killed McCarraghe, and after unlawfully entering and remaining in the residence of McCarraghe they committed a theft therein. The admission also establishes that lethal force was used in order

to gain access to McCarraghe's property in McCarraghe's presence.

Having been charged as both a principal and an accomplice to felony murder, Roberts admitted the use of force by killing McCarraghe to take property from McCarraghe, as well as the entry/remaining in McCarraghe's residence take steal something. Inmon and Roberts killed McCarraghe with premeditation and also in furtherance of the commission of a burglary and a robbery, as the evidence at the preliminary hearing shows.

c. Count 2: Conspiracy

i. The method of charging

The Complaint charges the defendant with Conspiracy to Commit First Degree Murder, citing statutes for Murder, Theft, Tampering, Hindering, Mutilation, and Concealment. A.R.S. §13-1003(c) instructs us that "A person who conspires to commit a number of offenses is guilty of only one conspiracy if the multiple offenses are the object of the same agreement or relationship and the degree of the conspiracy shall be determined by the most serious offense conspired to." It appears, then, that the State is required to include, in a single count of Conspiracy, all offenses for which there is probable cause to believe that the defendant conspired with another to commit.

However, the Complaint and Information are "notice" documents, designed to give the defendant a good idea about what he is being accused of. If one or some of the parts of the allegation no longer apply after the presentation of the evidence, then those extraneous parts can be excised out, leaving the still-relevant parts intact. Even if the parts of the allegation implicating Theft, Mutilation, Concealment, Tampering, Hindering are excised from the allegation, the part involving first degree murder remains unscathed, and the crime is validly charged.

ii. The evidence

As set forth above, the defendant's plan and actions with Inmon, which both Inmon and the defendant admitted, show they talked about the purposes of going to McCarraghe's house and their intention to do so, they got guns, they loaded the guns, they went to the house, they stalked the victim, they pulled away the screen, and they placed their guns, pulled the triggers and discharged their weapons into the small area where the victim was sleeping. By these actions and their agreement, they conspired to kill the victim. While no overt act is required to be proven in murder cases (cf. A.R.S. §13-1003), the overt acts in this case leading up to the murder support the continuing and indeed growing conspiracy between Inmon and Roberts.

d. Count 3: Theft of Means of Transportation

i. The method of charging

The Complaint charges the defendant with Theft of a Corvette owned by Daniel Achten. The statute for Theft of Means of Transportation (A.R.S. §13-1814) does not require a delineation of the method of thieving, but it does give five separate possible ways of committing the theft. Like First Degree Murder and Theft (*see*, State v. Dixon, 127 Ariz. 554, 561, 622 P.2d 501, 508 (App.1980)), Theft of Means of Transportation is a unitary offense. Thus, even if the State had identified one particular method of theft, but a second method were to become supported during a later court hearing, the State could legally argue that different method because the charging document would be deemed amended to conform to the evidence, under Rule 13.5, Ariz.R.Crim.Proc.

ii. The evidence

Inmon told Hounshell that Roberts had ended up having possession of Achten's Corvette after the moving and burning of the body. RT, 2/5/10, p. 29. Further, Inmon told Hounshell that

Inmon and Roberts had used Achten's Corvette, after tying a rope or strap to Achten in order to drag Achten's corpse to a hole behind Achten's house. RT, 2/5/10, pp. 28-29. Roberts had been stopped in the same Corvette in Springerville sometime before August 2009. RT, 3/19/10, p. 13. Roberts admitted to having received the Corvette from Inmon. RT, 3/19/10, p. 17. Roberts told Scruggs that, after Achten was murdered, Roberts and Inmon attached a tow strap between the Corvette and Achten's corpse and dragged the body from Achten's residence. RT, 3/19/10, p. 32.

The evidence at the preliminary hearing was that the Corvette belonged to Achten, not to Roberts, that Roberts had helped to use the car to help drag Achten's dead body from the house to a hole in the ground, and that Roberts had been driving the car in Springerville after Achten's death. A reasonable person confronted with these facts would determine that the defendant knowingly and without lawful authority controlled Achten's Corvette with the intent to permanently deprive or knowing or having reason to know that the Corvette was stolen. The car appears to have been Roberts' reward for helping to dispose of the body. It was Achten's car, Roberts knew that, yet Roberts brazenly drove the car after the burning of the body.

e. <u>Count 4: Mutilating</u>

The Complaint charges the defendant with Mutilating the body of Daniel Achten. This is charged under accomplice liability.

Roberts told Scruggs that he and Inmon set on fire the dead body of Achten. RT, 3/19/10, p. 32 and p. 35. Additionally, Inmon told Hounshell that he had asked for Roberts' help in disposing of Achten's body because Achten was too heavy for Inmon to handle alone. RT, 2/5/10, p. 28. Inmon said that Roberts assisted Inmon in digging a hole, putting Achten's body in that hole, placing wood in the hole with Achten's body and remained by Achten's body for

several hours while the body burned before ultimately burying Achten's body. RT, 2/5/10, 29.

Burning a dead human body for several hours clearly demonstrates probable cause to believe that the defendant mutilated Achten's body by irreparably damaging it with fire. There is probable cause for the offense of mutilating a body.

f. Count 5: Concealing

The Complaint charges the defendant with Concealment of a Dead Body by moving a body or parts thereof with the intent to abandon or conceal the body or those parts. This is charged under accomplice liability.

The facts supporting this offense are are similar to those for the mutilation charge. Rather than leaving the body where Achten had been killed, Roberts and Inmon removed the body from the house, put it in a hole and burned it. Presumably, if the body had been fully consumed, the ash would have fit inside the hole, which would have been easily buried. A reasonable conclusion to these facts is that they were trying to conceal the body.

g. Count 6: Tampering

The Complaint charges the defendant with Tampering with Physical Evidence. This is charged under accomplice liability.

The facts supporting the offenses of mutilating a body and concealing a dead body support a finding of probable cause that the defendant, either as an accomplice, a principal and/or a conspirator, tampered with evidence, specifically the attempt to make Achten's body unavailable for any criminal charges that might arise relative to the death of Achten's death.

h. Count 7: Hindering

The Complaint charges the defendant with Hindering Prosecution regarding Inmon's murder prosecution for victim McCarraghe.

Scruggs testified that, on September 25, 2010, Roberts was interviewed and that "it took a while before [Roberts] admitted his involvement in the crimes." RT, 3/19/10, p. 33. The initial and repeated denial of involvement in these crimes hindered the apprehension and prosecution of Inmon in what Roberts knew involved the murder of Mccaraghe. Further, Spivey testified that, during Spivey's interview of Roberts in 2007, Roberts had denied involvement in the McCarraghe murder. RT, 3/19/10, pp. 11-12. By denying knowledge of these events, the defendant concealed the identity of William Inmon as he related to the murder McCaraghe.

i. Count 8: Hindering

The Complaint charges the defendant with Hindering Prosecution regarding Dandridge's murder prosecution for victim McCarraghe.

Similar to as what was stated regarding Count 7 above, Roberts' denial of involvement hindered the apprehension and prosecution of James Dandridge in what he knew involved the murder of McCarraghe.

j. Count 9: Hindering

The Complaint charges the defendant with Hindering Prosecution regarding Inmon's murder prosecution for victim Achten.

Similar to as what was stated regarding Count 7 above, Roberts' denial of involvement hindered the apprehension and prosecution of Inmon in what he knew involved the murder of Achten.

k. Count 10: Hindering

The Complaint charges the defendant with Hindering Prosecution regarding Inmon's burglary/robbery prosecution for victim McCarraghe.

Similar to as what was stated regarding Count 7 above, Roberts' denial of involvement

hindered the apprehension and prosecution of Inmon for the felonies of Burglary and Robbery of McCarraghe.

I. Count 11: Hindering

The Complaint charges the defendant with Hindering Prosecution regarding Dandridge's burglary/robbery prosecution for victim McCarraghe.

Similar to as what was stated regarding Count 8 above, Roberts' denial of involvement hindered the apprehension and prosecution of Dandridge for the felonies of Burglary and Robbery of McCarraghe.

II. The Meeting On February 4, 2010, Did Not Substantially Impact The Presentation Of The Evidence At The Hearing Or Substantially Impair The Defendant's Ability To Participate In The Hearing

The allegation of prosecutorial misconduct and request for dismissal is not properly before this Court under a Rule 5.5 Motion.

The defendant argues that State v. Warner, 150 Ariz. 123, 722 P.2d 291 (1986), shows that the State interfered with the defendant's right to counsel such that the charges against him should be dismissed with prejudice. This is misplaced reliance. The *Warner* case is factually dissimilar to the facts in the case at bar. In *Warner*, jail personnel seized the defendant's documents, some of which were legal documents. The seizure happened about 30 days prior to trial, and the prosecutor had the documents during that time without advising defense counsel.

In the case at bar, the defendant had not invoked his *Miranda* or *Edwards* right to counsel and had conducted pre- and post-arrest interviews with police officers. Following a discussion with attorneys from the County Attorney's Office, two County Attorney investigators, Hounshell and Jaramillo, engaged the defendant in conversation on February 4, 2010. The discussion was recorded, but undersigned counsel does not know if a transcript has been prepared. The recording indicates that the defendant was advised of his Miranda rights at the beginning of the

conversation, and the defendant said he understood his rights. The investigators wanted to make sure the defendant knew what was going on in the litigation and what was being offered by the State. The defendant heard the information, and then the investigators left.

The facts here show that the Warner case is not applicable. The prosecutor in Warner had privileged communications in his possession. In the case at bar, no such communications were sought or received. Here, the defendant did not make any incriminatory statements, but rather listened to what the investigators had to say; there were no statements that might need to be suppressed.

Reliance on Warner is also misplaced because the law covering the two cases is markedly different. Because the facts in this case did not involve the search for and collection of physical evidence, there was no "search" as there was in Warner, where the 4th Amendment was implicated.

Reliance on Warner, a 1986 case, is also misplaced because there has been a change in the law regarding interviewing charged defendants, with appointed counsel, under these circumstances, where the defendant had not invoked his right to counsel under Miranda or Edwards but who did waive his right to have his attorney present. Montejo v. Louisiana, 129 S.Ct. 2079 (2009).

The meeting on February 4, 2010, did not substantially impact the preliminary hearing, whether or not such a meeting arose to a level of prosecutorial misconduct, which it did not. Rule 5.3, Ariz.R.Crim.Proc, clearly limits what the Court can consider during the hearing. Allegations of misconduct are not within those limits. Further, defense counsel was able to bring out many viable but ultimately insufficient arguments, both during *voir dire* and cross of the witnesses, as well as during legal argument. Also, the defense counsel was able to make an offer

of proof regarding particular witnesses. Despite the activities of February 4, the magistrate heard competent arguments and proffers from the defense regarding the limited presentation permitted under the law.

In the end, the allegation of prosecutorial misconduct and request for dismissal is not properly before this Court under a Rule 5.5 Motion.

III. The Presence Of Co-Defendant Inmon At The Hearing Would Not Have Impacted The Finding Of Probable Cause.

As the Court knows, the magistrate bound the case over to Superior Court. RT, 3/19/10, p. 41. At that point, the defense was given the opportunity to make an offer of proof, which opportunity the defense used. The magistrate noted that the defense witness, Inmon, was securely in jail on March 1, 2010. RT, 3/19/10, p. 42. Ultimately, the magistrate found that the proffered evidence "would be insufficient to rebut the finding of probable cause." RT, 3/19/10, p. 43.

During the hearing, the magistrate heard the pertinent admissions from interviews of the defendant and of Inmon, as well as descriptions of evidence that corroborated those admissions. There was no indication, other than the offer of proof, that Inmon would not be available to testify at trial. If he would have been brought to court, the argument about his unavailability would have been nullified. Therefore, the presence of Inmon would not have impacted the magistrate's decision to bind over the defendant to Superior Court.

IV. The Court Did Not Rush To Transfer The Case To Superior Court.

The defendant claims that the magistrate deprived the defendant of his procedural rights by rushing to get the case bound over to the Superior Court. The Court will recall that the defendant's original preliminary hearing was scheduled for October 2, 2009. At the defendant's requests, the preliminary hearing was repeatedly reset: October 9, 2009, November 6, 2009,

December 18, 2009, and February 5, 2010. At what turned out to be the end of the first day of the hearing, the defense asked to continue the hearing in order to look into the meeting on February 4. The hearing was reset to March 5, 2010. The defense then received another continuance to March 19, which was the second and final day of the hearing.

Contrary to the defense argument, it appears the Court was very accommodating to the defense in taking the preliminary hearing at a pace that was in line with the schedule the defendant wanted, continually resetting the hearing to make sure the defense could be as available as possible. The hearing started a full five months after it was originally scheduled to start, and even then it was stalled for about six more weeks so the defense could follow up with issues that had arisen during the first day. And during the hearing itself, the Court gave liberal leave to the defense to *voir dire* the witnesses and to engage in lengthy legal discussions regarding procedure. The Court appears to have done anything but rush the hearing.

E. CONCLUSION

The charges in the Complaint were sufficient as a matter of law. The charges in the Information are supported by facts presented to the magistrate. The magistrate did not deprive the defendant of any substantial procedural right when she acknowledged the court's lack of jurisdiction over the subject matter of the motion to dismiss. The defendant's motion to dismiss was, in any event, meritless.

The defendant was not denied any substantial procedural rights, and credible evidence of probable cause was brought forth during the hearing. The defendant's Rule 5.5 Motion is not

warranted by the evidence presented at the preliminary hearing.

The Motion for Review of Preliminary Hearing should be denied.

Submitted September 3, 2010.

RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY

BY /s/ John F. Beatty
/s/ John F. Beatty
Deputy Maricopa County Attorney

Original mailed/delivered
September 3, 2010, to:

Clerk of the Court
Apache County Superior Court
70 W. 3rd South
St. Johns, AZ 85936

Copy mailed/delivered
September 3, 2010, to:

Honorable Donna J. Grimsley
Apache County Superior Court
P.O. Box 365
St. Johns, AZ 85936
Judge of the Superior Court

David J. Martin, Esq.
P.O. Box 808
Lakeside, AZ 85929
Attorney for Defendant

BY /s/ John F. Beatty
/s/ John F. Beatty
Deputy Maricopa County Attorney